

FILED

UNITED STATES COURT OF APPEALS

JAN 25 2013

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

OLGA LILIA TOSCANO,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

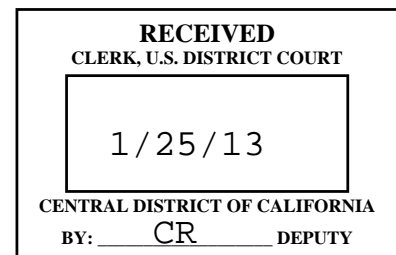
Respondent - Appellee.

No. 12-57323

D.C. Nos. 8:12-cv-00078-AHS
8:04-cr-00281-AHS-3

Central District of California,
Santa Ana

ORDER



Before: CANBY and CLIFTON, Circuit Judges.

A review of the record demonstrates that, although the December 3, 2012 notice of appeal was not filed or delivered to prison officials within 60 days after the order entered on September 10, 2012, appellant's notice of appeal contains a statement that she just recently learned of the court's decision. We construe this statement to be a motion to reopen the time to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(6). *See United States v. Withers*, 638 F.3d 1055, 1061 (9th Cir. 2011) (statement in notice of appeal that appellant did not receive judgment should be construed as motion to reopen time to appeal pursuant to Fed. R. App. P. 4(a)(6)). The district court has not had an opportunity to rule on that motion.

Accordingly, this appeal is remanded to the district court for the limited purpose of allowing that court to determine whether appellant's motion is timely and, if so, whether it should be granted.

If the district court grants the motion to reopen the time to appeal, appellant does not need to file a new notice of appeal.

The district court has not issued or declined to issue a certificate of appealability in this appeal, which arises under 28 U.S.C. § 2255. Accordingly, pursuant to circuit court policy, this case is also remanded to the district court for the limited purpose of granting or denying a certificate of appealability at the court's earliest convenience. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

If the district court issues a certificate of appealability, the court should specify which issue or issues meet the required showing. *See* 28 U.S.C. § 2253(c)(3); *Asrar*, 116 F.3d at 1270. If the district court declines to issue a certificate, the court should state its reasons why a certificate of appealability should not be granted, and the clerk of the district court shall forward to this court the record with the order denying the certificate. *See Asrar*, 116 F.3d at 1270.

Briefing is suspended pending further court order.

The Clerk shall serve this order on the district judge.